No. 90-757

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, cover elections for judicial office?

PARTIES

The following were parties in the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Voter Registration/Education Crusade, *Plaintiffs*;

The United States of America, *Plaintiff-Intervenor*;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of State of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, *Defendants*;

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., *Defendant-Intervenors*.

TABLE OF CONTENTS

Page:

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

1. *The Structure of the Louisiana Supreme Court* 4

2. *The Dilution of African American Voting Strength under the Current System of Electing Supreme Court Justices from the First Supreme Court District* 8

3. *The Course of the Proceedings Below* . . 22

SUMMARY OF THE ARGUMENT 24

ARGUMENT 27

I. THE PLAIN LANGUAGE AND STRUCTURE OF THE VOTING RIGHTS ACT COMPELS THE CONCLUSION THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS 27

A. The Plain Language of the Act . . 27

B. The Relationship Between Section 2 and Section 5 29

Page:

II. THE LEGISLATIVE HISTORY OF THE 1965 ACT AND THE 1982 AMENDMENTS CONFIRMS THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS 32
A. Congress' Intention in 1965 33
B. Congress' Understanding During the 1970 and 1975 Extensions 36
C. The 1982 Extension and Amendment of the Voting Rights Act 38

III. THE INAPPLICABILITY OF THE ONE-PERSON, ONE-VOTE REQUIREMENT OF THE EQUAL PROTECTION CLAUSE TO JUDICIAL ELECTIONS IS IRRELEVANT TO THE SCOPE OF SECTION 2 43
A. The Equal Protection Clause Does Govern Judicial Elections 44
B. The Theory of Vote Dilution Underlying One-Person, One-Vote Is Entirely Distinct from the Theory of Racial Vote Dilution Embodied in Section 2 46

IV. THE POST-ELECTION DUTIES OF JUDGES DO NOT JUSTIFY CREATING AN EXCEPTION TO SECTION 2'S COVERAGE OF JUDICIAL ELECTIONS 50
A. That Judges Need Not Be Elected At All Is Irrelevant to Whether Section 2 Covers Judicial Elections 51
B. Elected Judges Are In Fact "Representatives" 53
C. "Representativeness" Occupies a Critical Constitutional Position Within the Judicial System 56

V. MANAGEABLE STANDARDS EXIST FOR ASSESSING CLAIMS OF RACIAL VOTE DILUTION IN JUDICIAL ELECTIONS 62

CONCLUSION 66

TABLE OF AUTHORITIES

Cases: ***Page:***

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 59

Allen v. State Board of Elections, 393 U.S. 544 (1969) 27, 33, 51

Anderson v. Martin, 375 U.S. 399 (1964) 16

Batson v. Kentucky, 476 U.S. 79 (1986) 58

Beer v. United States, 425 U.S. 130 (1976) 19

Bridges v. California, 314 U.S. 252 (1941) 54

Brown v. Board of School Commissioners, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983) 52

Buckanaga v. Sisseton Independent School District No. 545, 804 F.2d 469 (8th Cir. 1986) 52

Burns v. Richardson, 384 U.S. 73 (1966) 46

Carter v. Jury Commission, 396 U.S. 320 (1970) 58, 61

Chandler v. Roudebush, 425 U.S. 840 (1976) 42

Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988) 10, 22, 23

Chisom v. Roemer, 917 F.2d 187 (5th Cir. 1990) 10, 24

Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 488 U.S. 1002 (1989) 19

City of Rome v. United States, 446 U.S. 156 (1980)16, 32

Conley v. Gibson, 355 U.S. 41 (1957) 10

Page:

Craig v. Harney, 331 U.S. 367 (1947) 55

Davis v. Mann, 377 U.S. 678 (1964) 48

Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 28, 33

Duncan v. Louisiana, 391 U.S. 145 (1968) 18

Duren v. Missouri, 439 U.S. 357 (1978) 61

Gaffney v. Cummings, 412 U.S. 735 (1973) 46

Georgia State Board of Elections v. Brooks, 111 S. Ct. 288 (1990) 22, 29, 51

Hamilton v. Alabama, 376 U.S. 650 (1964) 35

Holland v. Illinois, 110 S.Ct. 803 (1990) 58

Johnson v. Virginia, 363 U.S. 61 (1963) 35

Landmark Communications v. Virginia, 435 U.S. 829 (1978) 54

League of United Latin American Citizens v. Midland Independent School District, 829 F.2d 546 (5th Cir. 1987) 52

Louisiana v. United States, 380 U.S. 145 (1965) 18

Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) 48

LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) *passim*

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) . 14, 18, 19

Martin v. Haith, 477 U.S. 901 (1986) 22, 29, 51

Page:

Maryland Comm. for Fair Representation v.Tawes, 377 U.S. 656 (1964) 48

McMillan v. Escambia County, 748 F.2d 1037 (11th Cir. 1984) 11

Mobile v. Bolden, 446 U.S. 55 (1980) 38, 39, 42

Peters v. Kiff, 407 U.S. 493 (1972) 59, 60

Reynolds v. Sims, 376 U.S. 533 (1964) 46, 48

Roman v. Sincock, 377 U.S. 695 (1964) 48

Romero v. City of Pomona, 665 F. Supp. 853 (C. D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989) 64

Sailors v. Board of Education of Kent County, 387 U.S. 105 (1967) 52

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) 44

Smith v. Texas, 311 U.S. 128 (1940) 57

Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968) . . 18

South Carolina v. Katzenbach, 383 U.S. 301 (1965) . . 28

Strauder v. West Virginia, 100 U.S. 303 (1880) 58

Taylor v. Louisiana, 419 U.S. 522 (1975) 59

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) . . 59

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . . *passim*

United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965) 36

Page:

United States v. Dallas County Commission (and Dallas County Board of Education), 850 F.2d 1430 (11th Cir. 1988), *cert. denied,* 490 U.S. 1030 (1989) 52

United States v. Mississippi, 229 F. Supp. 925, 985 n. 35 (S.D. Miss. 1964), *rev'd,* 380 U.S. 128 (1965) 35

United States v. Mississippi, 380 U.S. 128 (1965) 34, 35

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 33

Vasquez v. Hillery, 474 U.S. 254 (1986) 58

Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980) 40

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) 43, 49

Whitcomb v. Chavis, 403 U.S. 124 (1971) 46

White v. Regester, 403 U.S. 182 (1971) 41, 47

WMCA v. Lomenzo, 377 U.S. 633 (1964) 48

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) . 47, 48

Statutes:

La. Const. art. V § 22(b) 7

Pub. L. No. 91-285, 84 Stat. 314 (1970) 37

Pub. L. No. 94-73, 89 Stat. 400 (1975) 37

Voting Rights Act of 1965 as amended, § 2, 42 U.S.C. § 1973 . . . . . *passim*

Page:

Voting Rights Act of 1965 as amended, § 5, 42 U.S.C. § 1973c 22, 24, 29-32, 36, 38, 52

Voting Rights Act of 1965, § 14(c)(1), 42 U.S.C. § 1973*l*(c)(1) 3, 28, 29, 42

Other Authorities:

30 Fed. Reg. 9897 (1965) 19

115 Cong. Rec. 38,493 (Dec. 11, 1969) 37

D. GARROW, PROTEST AT SELMA (1978) 36

Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3948 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 2246 (1981) 30, 38

E. HAYNES, THE SELECTION AND TENURE OF JUDGES (1944) 55

H. REP. No. 97-227 (1982) 38

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L. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985) 55

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) 53

Page:

S. Rep. No. 94-295 (1975) 37

S. Rep. No. 97-417 (1982) . . . . . *passim*

Southern Justice (L. Friedman ed. 1963) 35

Voting Rights Act: Hearings on S. 53, S. 1761, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 19, 31, 39

Voting Rights: Hearings Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitutional of the United States, 89th Cong., 1st Sess. (1965) . . . 33-35

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals remanding the case to the district court with orders to dismiss the claims under the Voting Rights Act in light of *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), is contained in the Appendix to the Petition for Certiorari [hereafter "Pet. App."], at pages 1a-3a, and is reported at 917 F.2d 187 (5th Cir. 1990). The opinion of the district court is contained in

the Pet. App. at pages 4a-64a and in the Supplemental Appendix to the Petition for Certiorari [hereafter "Supp. Pet. App."]; it is not reported. An earlier opinion of the Court of Appeals is reported at 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988). An earlier opinion of the district court is reported at 659 F. Supp. 183 (E.D. La. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1990. The petition for certiorari was filed on November 14, 1990. On January 18, 1991, this Court granted the petition for certiorari; it also consolidated this case with No. 90-1032, *United States v. Roemer*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, which provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in Section 1973(b)(f) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivison are not equally open to participation by members of a class of citizens protected by subdivision (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

This case also involves section 14(c)(1) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(c)(1), which provides, in pertinent part, as follows:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office and propositions for

which votes are received in an election.

STATEMENT OF THE CASE

This case involves a challenge, under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, to the sole multimember electoral district used to select a Justice for the Louisiana Supreme Court. Petitioners claim that the election scheme illegally dilutes the voting strength of Orleans Parish's African American voters by submerging that majority African American parish in a majority white district.

1. *The Structure of the Louisiana Supreme Court*

The Louisiana Supreme Court is the highest court of the State of Louisiana. The court has seven Justices,[1] each of whom is elected to a ten-year term. Pet. App. 7a.

The system under which justices are elected is, in all

[1]Pursuant to state law, the Louisiana Supreme Court sits *en banc* and its jurisdiction extends statewide. A single justice court may issue a writ of habeas corpus and all needful writs, orders and process in aid of the court's jurisdiction, but exercise of this authority is subject to review by the whole court. Pet. App. 8a.

essential respects, identical to the system under which other, nonjudicial state officials are selected. Justices, like nonjudicial public officials, are elected from geographically defined districts; each Justice must reside in the district from which he or she seeks election, and only voters who live in that district are eligible to vote in its judicial election. Pet. App. 7a, 8a. Candidates for the Supreme Court, like candidates for nonjudicial offices, compete in an "open primary": although party affiliation is indicated on the ballot, all candidates compete against one another. Pet. App. 7a. Elections for the Supreme Court, like elections for nonjudicial positions, are governed by a majority-vote requirement: if no candidate receives a majority of the votes cast in the open primary, the two candidates who received the most votes compete head-to-head in the general election. *Id.*

Five of the seven Justices on the Louisiana Supreme Court are elected from single-member districts. The five single-member election districts consist of between eleven and fifteen whole parishes each. The smallest of these

districts (the Fourth Supreme Court District) has a total population of 410,850; the largest (the Fifth Supreme Court District) has a total population of 861,000. Pet. App. 10a.

Two of the Justices are elected from the multi-member First Supreme Court District. Pet. App. 7a-8a. The First Supreme Court District is also the state's *only* multimember Supreme Court District. It encompasses Orleans Parish (the city of New Orleans), and three adjoining parishes, St. Bernard, Plaquemines, and Jefferson. Orleans Parish has a slight African American majority both in total population and in registered voters. Pet. App. 10a, 11a. The other three parishes are all overwhelmingly white both in total population and in registered voters. *Id.* Overall, then, the First Supreme Court District has a substantial white majority in both population and registered voters. *Id.* Elections for the two Supreme Court positions from the First Supreme Court District are not conducted in the same year. Rather, the two terms are staggered. Pet. App. 8a.

The Louisiana Constitution does not require that the election districts for the Supreme Court be apportioned

equally by population. Pet. App. 8a-9a. Indeed, the total population deviation among districts is 74.95%. *See* Pet. App. 12a (the Fourth Supreme Court District is 31.62% below the equipopulous district size of 600,843, while the Fifth Supreme Court District is 43.33% above the equipopulous district size).

Although 29 percent of Louisiana's citizens are African American, every supreme court district is majority-white both in total population and in number of registered voters. *See* Pet. App. 10a. No African American person has been elected to the Louisiana Supreme Court in modern times. Only one African American person has served on the Louisiana Supreme Court in this century. He was appointed by the governor to fill a vacancy on the court for a period of 17 days during November of 1979, Pet. App. 35a-36a, and under state law, could not seek election to the seat to which he had been appointed. *See* La. Const. art. V § 22(b).

2. *The Dilution of African American Voting Strength under the Current System of Electing Supreme Court Justices from the First Supreme Court District*

Petitioners are five African American registered voters who live in Orleans Parish and an organization active in voter registration and education. They brought suit on behalf of a class of all African American voters in Orleans Parish raising claims under both section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 and the Fourteenth and Fifteenth Amendments to the Constitution.[2]

The basic theory of petitioners' section 2 claim is that the voting strength of Orleans Parish's African American voters is diluted by their submergence within the majority-white, multimember First Supreme Court District. In proving that claim at trial, petitioners showed the presence of *all* of the relevant circumstances that Congress in amending section 2[3] and this Court in interpreting amended

[2]Only petitioners' section 2 claim is before the Court.

[3]Congress identified seven "[t]ypical factors":

> "1. the extent of any history of official discrimination in the state or political subdivision that touched upon the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the ju:isdiction."

S. REP. NO. 97-417, pp. 28-29 (1982) [hereafter "Senate Report"]. In *Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7 (1986), this Court recognized the "authoritative" nature of the Senate Report.

section 2[4] have treated as probative of a section 2 violation. At this juncture petitioners seek review only of the court of appeals' holding that, as a matter of law, they cannot state

[4]In *Gingles*, this Court identified three critical elements of a section 2 challenge to the use of multimember election districts:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed, . . .--usually to defeat the minority's preferred candidate.

Id. at 50-51.

a claim under section 2.[5] Thus, we summarize the evidence documenting these circumstances only briefly.

This Court has identified racial bloc voting and the degree of minority electoral success as the two "most important Senate Report factors bearing on § 2 challenges to multimember districts," *Thornburg v. Gingles*, 478 U.S. at 48 n. 15. With regard to the first of these central factors, the evidence is undisputed: Voting in judicial elections within the First Supreme Court District is characterized by

[5]After a full trial, the district court ruled against petitioners. Pet. App. 61a-62a. Petitioners appealed that judgment, arguing that the district court had been clearly erroneous with regard to several of its factual findings, and had misapplied the law. After oral argument before the panel, but before a decision was rendered, the Fifth Circuit, sitting *en banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Mattox*, No. 90-813 (Jan. 18, 1991), overruled *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988) (*Chisom I*), which had held section 2 applicable to elections for the Louisiana Supreme Court.

In light of *LULAC v. Clements*, the panel remanded this case to the district court with directions to dismiss petitioners' section 2 claim. *Chisom v. Roemer*, 917 F.2d 187, 188 (5th Cir. 1990) (*Chisom II*). The panel never reached the question whether the district court's findings of fact were clearly erroneous. Nor, despite the fact that all three of the judges on the *Chisom II* panel believed that section 2 does apply to appellate judicial elections, *see LULAC*, 914 F.2d at 635-45 (Higginbotham, J., joined by, among others, King, J.); *id.* at 651-67 (Johnson, J.), did the panel have any opportunity to address petitioners' claims of legal error.

Given the posture of this case, this Court should assume the truth of petitioners' factual allegations. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Accordingly, if this Court reverses the court of appeals, it should remand the case to that court to consider the question whether petitioners have established an actual violation of section 2.

pervasive and severe racial bloc voting.[6] There have been 34 recent judicial elections within the First Supreme Court District in which both African American and white candidates competed.[7] The figures reveal a stark fact: although a majority of African American voters supported the African American candidate in 29 of those elections, white voters *never* cast even a simple plurality of their votes for a *single* African American candidate. They overwhelmingly preferred the white candidate in *every* election.

The difference in support for African American candidates is staggering. Within Orleans Parish, African American support for African American candidates in contested elections since 1978 *averaged* 80 percent. White support for those same candidates averaged only 17 percent.

[6]Senate Report factor 2 and the second and third factors identified in *Gingles*. *See Gingles*, 478 U.S. at 56 (minority political cohesiveness and white bloc voting, taken together, constitute racially polarized voting).

[7]These elections all involved contests for lower courts, such as the Civil District Court, Juvenile Court, and Criminal District Court. No African American has run for the Louisiana Supreme Court since 1972. *See Gingles*, 478 U.S. at 57 n. 25; *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984) ("the lack of black candidates [for a particular position] is a likely result of a racially discriminatory system").

The difference in Jefferson Parish was even greater. There, the average support for the African American candidates among African American voters was 90 percent, while the average support among white voters was only 10 percent. *See* Supp. Pet. App., Table 3.

It is, of course, true that African American candidates *have* won election to both judicial and nonjudicial offices *within* Orleans Parish. *See* Pet. App. 37a-41a. But they have done so *in spite of* overwhelming white support for their opponents; they won only because African American voters outnumber white voters *within Orleans Parish*. *See* Pet. App. 11a. Put simply, analysis of voter behavior in elections involving the four-parish area establishes two things: first, that voting is so racially polarized that no African American candidate can win in an election in which residents of all four parishes vote, and second, that African Americans within Orleans Parish have the potential to elect the candidate of their choice in Orleans Parish-only contests.

This stark racial bloc voting is true for both judicial and nonjudicial races within the four parishes of the First

Supreme Court District. For example, in the 1987 Secretary of State election, which involved ten candidates, African American voters in the four parishes comprising the First Supreme Court District cast a majority of their votes for African American candidate Edwin Lombard, whom the District Court acknowleged to be extremely popular and qualified. Trial Transcript at 120. White voters, however, the majority of their votes for one of the white candidates, and cast only 20 percent of their votes for Lombard. *See* Stipulation 80. Similarly, in the 1988 Democratic presidential primary, the Rev. Jesse L. Jackson received approximately 96.9% of the votes cast by African American voters in the four parishes comprising the First Supreme Court District, but only 3.5% of votes cast by whites. Plaintiffs' Exhibit 1. In short, when African American and white candidates compete for the same office, African American voters within the First Supreme Court District almost always strongly prefer the African American candidate, while white voters invariably and overwhelmingly support the white candidate.

Second, there is a total lack of African American electoral success in elections involving the entire First Supreme Court District.[8] No African American has won election to *any* parish-wide office in St. Bernard, Plaquemines, or Jefferson Parishes in recent times. Pet. App. 42a. Because the electorate of the First Supreme Court District is majority white, the severe degree of racial bloc voting that prevails makes it impossible for the African American community to elect an African American to the Louisiana Supreme Court.[9]

With regard to the Senate Report factors that this Court has identified as "supportive of, but *not essential* to, a

[8]Senate Report factor 7.

[9]There are 492,691 registered voters in the First Supreme Court District, 156,714 of whom (31.8%) of whom are African American and 335,977 (68.2%) of whom are white. For the African American candidate to win, he or she would have to attract roughly 28 percent of the white vote (even using the unrealistic assumptions that African American voters participate in judicial elections at as high a rate as white voters, *see* Pet. App. 51a, and that *every* African American voter votes for the African American candidate, *see id.*). In only three of 32 parishwide races *within* Orleans Parish did an African American candidate receive more than a quarter of the white vote. *See* Supp. Pet. App. Table 3. In *no* election in the three suburban parishes did an African American fare that well. *Id.*; *see also Major v. Treen*, 574 F. Supp. 325, 339 (E.D. La. 1983) (three-judge court) (white voters in the suburban parishes, who moved out of Orleans Parish largely to escape school desegregation decrees, are less likely than white voters within Orleans Parish to support African American candidates); U.S. Exhibit 49 at 12 (same).

minority voter's claim," *Gingles*, 478 U.S. at 48 n. 15, the evidence is equally compelling. First, elections for Supreme Court Justice from the First Supreme Court District are characterized by *all three* of the structural practices Congress identified as likely to "enhance the opportunity for discrimination" against minority voters: unusually large election districts, majority vote requirements, and anti-single shot provisions. Senate Report at 29.[10] The First Supreme Court District has twice the population of any congressional district in Louisiana and, in terms of population, is the largest of *any* of the state's election districts. Stipulation 82. African American candidates are particularly handicapped by the large number of voters who must be reached and persuaded. *See* Pet. App. 32a. In addition, a majority vote requirement applies to elections for the Supreme Court. Pet. App. 7a. Finally, elections for the two Supreme Court positions from the First Supreme Court District are not conducted in the same year. Because the terms are staggered, voters are prevented from single-shot voting. Pet.

[10]Senate Report factor 3.

App. 8a; Stipulation 22.[11]

Second, race plays a significant role in the electoral process.[12] While there is no formal slating process for judicial candidates within the First Supreme Court District,[13] bar association endorsements provide a critical form of candidate support akin to slating in traditional legislative contests. "All of the current officers of the Louisiana Bar Association are white, and no black judge has ever served as one of the officers of the Louisiana District Judges Association." Pet. App. 31a. Moreover, the New Orleans

[11]Single shot voting occurs when a voter (or group of voters) casts votes for fewer than all the seats for which he or she is entitled to vote. For example, in an election in which voters are entitled to vote for two judicial candidates to fill two seats on the bench, a voter who single-shot votes would cast a vote for only his or her first-choice candidate. By denying other candidates any electoral support, the single-shot voter will increase the share of the total vote cast received by his or her first choice. A cohesive racial minority may have the potential, under certain circumstances (such as a very fragmented white electorate), to use this strategy to elect its preferred candidate. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 184 n. 19 (1980) (explaining the mechanics of single-shot voting). If each seat in a multimember district is elected separately, however, single-shot voting becomes impossible. *Id.*

[12]In 1960 Louisiana enacted a statute, struck down by this Court in *Anderson v. Martin*, 375 U.S. 399 (1964), that put on the ballot the race of each candidate "for any elective office in this state," *id.* at 400 n. 1 (quoting LA. REV. STAT. § 18:1174.1), treating judicial positions identically with all other offices. This Court found that the statute represented an attempt by the state to "require or encourage its voters to discriminate upon the grounds of race." *Id.* at 402.

[13]Senate Report factor 4.

Bar Association has never endorsed an African American candidate for judicial office. Pet. App. 32a. Although the district court found no overt racial appeals in judicial elections, *see* Pet. App. 42a, race continues to play a prominent role in political campaigns in the First District, particularly in Jefferson, Plaquemines and St. Bernard parishes.[14] For example, African American candidates for positions on lower courts within the First Supreme Court District have been advised by white consultants not to use their pictures on campaign literature or make personal appearances in Jefferson Parish, since such behavior would highlight their race and cause white voter backlash. *See* Trial Transcript at 64-66, 69-70, 74, 87-88. Moreover, African American candidates are often reluctant to travel into some areas of the First Supreme Court District because of fears for their physical safety. A sitting African American lower court judge testified that he would feel "intimidated" campaigning in either Plaquemines or St. Bernard parishes, *see* Trial Transcript at 25, and that, on a

[14]Senate Report factor 6.

recent trip to hold a judicial session in Plaquemines, he had had the Sheriff of Orleans Parish contact the Sheriff of Plaquemines, in order to ensure his safety while travelling in Plaquemines. *Id.*[15]

Third, Louisiana's long history of discrimination[16] in the area of voting rights is undisputed. Pet. App. 22a-23a; *see also Louisiana v. United States*, 380 U.S. 145, 148-50 (1965) (describing Louisiana's racially discriminatory use of "grandfather clauses," "interpretation" tests, white primaries, and wholesale purging and challenging of black voters); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (describing Louisiana's history of racial discrimination in voting). Nor is that discrimination simply ancient history. It continues to deny, dilute and abridge the

[15]For a general history of discriminatory administration of justice within Plaquemines Parish, see, e.g., *Sobol v. Perez*, 289 F. Supp. 392, 401-02 (E.D. La. 1968) (three-judge court) (per curiam) (detailing, *inter alia*, how the parish's elected state court district judge and other authorities had harrassed the civil rights lawyer representing the defendant in *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

[16]Senate Report factor 1.

voting rights of Louisiana's African American citizens.[17]

Fourth, the lingering effects of Louisiana's long, undisputed history of discrimination in such areas as education and employment have left Orleans Parish's African American citizens less able than white citizens to participate effectively in the political process.[18] Pet. App. 30a-32a. Census figures showed vast disparities in socioeconomic indicators between African Americans and whites within the First Supreme Court District. Pet. App. 30a; Stipulations

[17]Since 1965, Louisiana has been subject to the special preclearance provisions of the Voting Rights Act of 1965. 30 Fed. Reg. 9897 (1965). Pursuant to those provisions, twelve parishes, including one within the First Supreme Court District, have been designated for the appointment of federal examiners. Stipulation 45. Moreover, between 1965 and 1981, the Department of Justice objected to over one hundred proposed changes of Louisiana's electoral laws (including several applicable only to Orleans Parish) because it was unable to conclude that the changes had neither a discriminatory purpose nor a discriminatory effect. *See Voting Rights Act: Hearings on S. 53, S. 1761, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 97th Cong., 2d Sess. 1783 (1982) [hereafter *"1982 Senate Hearings"*]. Finally, the state and localities within the First Supreme Court District have continued to use districting schemes that diluted African American voting strength. *See, e.g., Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 488 U.S. 1002 (1989) (invalidating use of at-large elections for city council of Jefferson Parish municipality); *Major v. Treen*, 574 F. Supp. 345 (E.D. La. 1983) (three-judge court) (striking down the state's 1980 congressional apportionment in the Orleans Parish area on section 2 grounds); *Beer v. United States*, 425 U.S. 130, 135 (1976) (describing how the scheme for electing the New Orleans City Council initially adopted following the 1970 census improperly diluted black voting strength).

[18]Senate Report factor 5.

36-45 and 93-99. For example, the median family income for white families was twice the median income for African American families in Orleans Parish. Stipulations 106 and 107. The upshot of this is that "[t]he relatively lower economic status of local black residents further affects . . . such practicalities as campaign funding. In this regard, both Judge [Revius] Ortique and Judge Bernadette Johnson testified that black [judicial] candidates have considerable difficulty raising campaign funds and that generally, the better funded candidates win." Pet. App. 32a.

In addition to the Senate Report factors, this Court has identified an additional circumstance relevant to section 2 claims of dilution through submergence: is the minority group "sufficiently large and geographically compact to constitute a majority in a single-member district"?[19] In this case, it is eminently possible to create a majority-African American Supreme Court District. Orleans Parish, which contains more than half of the current First Supreme Court District's total population, is majority African American in

[19]*Gingles* factor 1.

both total population and registered voters. *See* Pet. App. 10a & 11a. It would be possible to divide the current district into an Orleans Parish-only district and a suburban district containing Jefferson, St. Bernard, and Plaquemines Parishes. The Orleans Parish district would be majority African American, while the suburban district would be overwhelmingly white. Each of these districts would have a population roughly the size of the current Sixth Supreme Court District. *See* Pet. App. at 10a. They would thus fit comfortably within the population deviations currently countenanced by Louisiana's practice. Moreover, both districts would adhere to the State's practice of not dividing parishes between or among Supreme Court Districts.[20]

[20]The United States, petitioner in No. 90-1032, *United States v. Roemer*, appeared as a plaintiff-intervenor at trial. It presented evidence showing that a smaller population deviation could be obtained while still creating a majority-African American single-member district by adding contiguous, predominantly African American areas of Jefferson Parish to Orleans Parish. *See* United States' Exhibit 14. According to the 1980 Census, this district would have a population deviation from the ideal district of -4.4%.

3. *The Course of the Proceedings Below*

Petitioners filed their complaint in 1986. Originally, the district court dismissed their complaint holding, among other things, that section 2 did not apply to the election of judges. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). A panel of the Fifth Circuit unanimously reversed, holding that the plain language, the legislative history of the original Voting Rights Act and of the 1982 amendments, the complementary operation of section 2 and section 5 (which this Court has consistently held applicable to judicial elections, *see Georgia State Board of Elections v. Brooks*, 111 S. Ct. 288 (1990) (No. 90-332); *Martin v. Haith*, 477 U.S. 901 (1986), *summarily aff'g*, 618 F. Supp 410 (E.D.N.C. 1985)), and the longstanding interpretation of the Act by the Attorney General compelled the conclusion that section 2 covers judicial elections. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom I*). The defendants' requests for rehearing and rehearing *en banc* were denied without dissent, and this Court denied certiorari. *Roemer v.*

Chisom, 488 U.S. 955 (1988).

Petitioners then sought an injunction enjoining the state from going forward with an election under the challenged system. The district court granted petitioners' request, *Chisom v. Roemer*, 690 F. Supp. 1524 (E.D. La. 1988), but a divided panel of the court of appeals reversed, *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988).

The case then proceeded to trial.[21] After trial, the district court concluded that petitioners had not established a violation of section 2. Pet. App. 52a-61a. Petitioners appealed, contending that the district court both made clearly erroneous findings of fact and misapplied the relevant law. After briefing and oral argument occurred, the Fifth Circuit, sitting *en banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), *cert. granted sub nom. Houston Lawyers' Ass'n v. Mattox*, No. 90-813 (Jan. 18, 1991), overruled *Chisom I*. In light of *LULAC*, the panel

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[21]The United States, which had previously participated in the court of appeals as *amicus curiae*, intervened as a party plaintiff upon the Attorney General's certification that this was a case of exceptional public importance.

remanded this case to the district court with directions to dismiss petitioners' section 2 claim. *Chisom v. Roemer*, 917 F.2d 187, 188 (5th Cir. 1990) (*Chisom II*).

SUMMARY OF THE ARGUMENT

The plain language and structure of the Voting Rights Act of 1965 show that section 2 covers judicial elections. The Act's definitional provision covers voting for every "public office" without exception, and section 2 itself provides that "no voting procedure" may be used that results in racial vote dilution. Moreover, this Court has unanimously held that section 5 of the Voting Rights Act, which Congress expressly directed be interpreted in tandem with section 2, covers judicial elections. If section 5 reaches judicial elections, then section 2 must as well.

The legislative history of the Act, from its original passage in 1965 through its extensions and amendments in 1970, 1975, and 1982, buttresses the conclusion that section 2 covers judicial elections. The drafters of original section 2 intended it to cover every election, and the Congresses

that extended and amended the Act were aware of its salutary impact in integrating state court benches. The 1982 amendments of section 2 were intended to expand section 2's scope further, and Congress' use of the word "representatives" in a single statutory clause cannot be read as an attempt to carve out an exemption from the Act for judicial elections.

The fact that the one-person, one-vote requirement does not apply to judicial elections is irrelevant to the scope of section 2. The quantitative theory of vote dilution that underlies one-person, one-vote is entirely distinct from the qualitative theory of vote dilution that provides the basis for section 2. Indeed, one-person, one-vote is intended to protect the voting rights of the majority while section 2 is intended to protect the voting rights of minorities.

Nor do ostensibly unique aspects of the judicial office justify creating an exception to section 2's broad coverage. The fact that judges need not be elected has no bearing on whether, having decided nonetheless to elect its judiciary, a state must ensure that its election system is fair to African

American voters. In addition, although they do not respond directly to constituent sentiment, elected judges are "representatives" in several significant respects. Furthermore, it is critical to the administration of justice that no identifiable racial group be excluded from participating equally in the adjudicative process.

Lastly, manageable standards exist for assessing section 2 claims involving judicial elections. Congress has set out a flexible, totality-of-the-circumstances test that is entirely appropriate for evaluating allegations of racial vote dilution in the election of judges. And the inapplicability of the one-person, one-vote requirement poses no serious obstacle to determining whether non-dilutive alternatives to the present system exist.

ARGUMENT

I.
THE PLAIN LANGUAGE AND STRUCTURE OF THE VOTING RIGHTS ACT COMPELS THE CONCLUSION THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS

This Court has long recognized Congress' "intention to give the [Voting Rights] Act the broadest possible scope," *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969). The plain language Congress chose to describe the Act's coverage and the Act's overall structure convincingly show that judicial elections are covered by section 2.

A. *The Plain Language of the Act*

Section 2 announces an absolute prohibition on racial discrimination in voting:

> *No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in the denial or abridgement of the right of any citizen of the United States to vote on account of color . . . .

42 U.S.C. § 1973(a) (emphasis added). Section 2 contains neither an express nor an implicit exemption for *any*

category of elections. *See also South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1965) (section 2 "broadly prohibits" voting discrimination). Had Congress intended to permit states to conduct their judicial elections in a fashion that results in denying or abridging the voting rights of African Americans, it surely would have said so directly.

Moreover, the definitional provision of the Act, section 14(c)(1), confirms the conclusion that section 2 reaches judicial officers, for it states, in pertinent part, that

> [t]he terms "vote" or "voting" shall include all action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly *with respect to candidates for public* or party *office* and propositions for which votes are received in an election.

42 U.S.C. § 1973*l*(c)(1) (emphasis added). Aspirants for elective judicial positions, such as Justice of the Louisiana Supreme Court, are clearly "candidates for public . . . office," and the means by which they attain those offices are equally clearly "elections." *See also Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978)

(section 14(c)(1) "expansively defines the term 'voting'"). The plain language of the Voting Rights Act thus shows Congress' consistent intention to reach *all* forms of electoral discrimination and to ensure that African Americans have an equal opportunity to elect state-court judges as well as other elected officials.

B. *The Relationship Between Section 2 and Section 5*

This Court has squarely held that section 5 of the Voting Rights Act, 42 U.S.C. § 1973c--which requires certain jurisdictions (including Louisiana) with a history of racial discrimination to seek the prior approval ("preclearance") of either the Attorney General or the United States District Court for the District of Columbia before making any change in their election practices--applies to judicial elections. *See State Board of Elections v. Brooks*, 111 S.Ct. 288 (1990); *Martin v. Haith*, 477 U.S. 901 (1986). The Attorney General, the official responsible for interpreting and administering section 5, has consistently applied section 5 to judicial elections, and he informed

Congress of this practice prior to the 1982 extension of section 5. *See, e.g., Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3948 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 2246 (1981) ["*1982 House Hearings*"] (noting Attorney General's letter of Dec. 26, 1972, to the State of Alabama, interposing an objection to a change from "elective to appointive judges"); *id.* at 2247 (noting Attorney General's letter of Dec. 20, 1976, to the State of Alabama, objecting to "Act No. 1205 [which] combines counties for [a] judicial district); *id.* at 2260 (noting Attorney General's letters of Feb. 7, 1980, and Oct. 10, 1980, to the City of Baton Rouge and the State of Louisiana, regarding the use of majority-vote requirements for elected judges).

Given this Court's repeated, unanimous conclusion that section 5 covers judicial elections, the relationship between that provision and section 2 compels the conclusion that section 2 applies to judicial elections as well. Congress

explicitly intended the two provisions to work in tandem. *See* Senate Report at 5-6. It explained:

> Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under section 2] or preclearance [under section 5]. The lawfulness of such a practice should not vary depending on when it was adopted, i.e., whether it is a change.

H.R. REP. No. 97-227, p. 28 (1982) ["House Report"]; *see also 1982 Senate Hearings* at 85 (testimony of Attorney General William French Smith) (the 1982 amendments to section 2 "exten[d] nationwide" the effects test of section 5 and apply that test not only to proposed changes but also "to existing situations"). To adopt the position that only section 5 applies to judicial elections would ignore Congress' position that "[s]ection 2 remains *the major* statutory prohibition of *all* voting rights discrimination," Senate Report at 30 (emphasis added), and would "lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it

would be subject to Section 5 preclearance and could not be implemented." *LULAC v. Clements*, 914 F.2d at 645 (Higginbotham, J., concurring in the judgment). Congress did not enact a Voting Rights Act "grandfather clause" that lets Louisiana continue to elect its Supreme Court under a regime that the Voting Rights Act would not permit it to adopt today.

II.
THE LEGISLATIVE HISTORY OF THE 1965 ACT AND THE 1982 AMENDMENTS CONFIRMS THAT SECTION 2 APPLIES TO JUDICIAL ELECTIONS

Since its enactment in 1965, the Voting Rights Act has been extended thrice (in 1970, 1975, and 1982) and substantially amended. At each juncture, Congress has made clear its commitment "to counter the perpetuation of 95 years of pervasive voting discrimination," *City of Rome v. United States*, 446 U.S. 156, 182 (1980), and to "create a set of mechanisms for dealing with continued voting discrimination . . . comprehensively and finally." Senate Report at 5.

A. *Congress' Intention in 1965*

The Voting Rights Act originated as H.R. 6400, a bill drafted by the Johnson Administration and introduced by Rep. Emanuel Celler, the Chairman of the House Judiciary Committee. That Committee conducted lengthy hearings on the bill. *See Voting Rights: Hearings Before Subcomm. No. 5 of the House Judiciary Comm. on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitutional of the United States*, 89th Cong., 1st Sess. (1965) ["*1965 House Hearings*"]. At those hearings, Attorney General Nicholas D. Katzenbach testified in detail as to the bill's scope. This Court has held that, "in light of the extensive role [he] played in drafting the statute and explaining its operation to Congress," Attorney General Katzenbach's construction of the Act is entitled to great weight. *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 131 & n. 20 (1978); *see also Dougherty County Board of Education v. White*, 439 U.S. at 37 n. 5; *Allen v. State Board of Elections*, 393 U.S. at 566-59;

Senate Report at 17 & n. 51.

Attorney General Katzenbach's statement to the Committee was explicit: "*Every election in which registered electors are permitted to vote* would be covered" by the new Act. *1965 House Hearings* at 21 (emphasis added). He reiterated this intention in a number of additional colloquies. *See, e.g., id.* at 50 (responding to Rep. Byron Rogers); *id.* at 67 (responding to Rep. Robert Kastenmeier); *id.* at 121 (responding to Rep. Jacob Gilbert). The Attorney General made clear that there was *no* categorical exception to the Act's scope.

Moreover, the Attorney General's statement to the Committee reflected the Administration's awareness of and concern about the relationship between the elected southern judiciary and the denial and abridgment of African American voting rights. One of the central props buttressing the "establish[ment of] white supremacy in a completely segregated society," *United States v. Mississippi*, 380 U.S.

128, 144 (1965),[22] was the maintenance of "[a]n electoral system to preserve the white control on executive *and judicial offices*," *United States v. Mississippi*, 229 F. Supp. 925, 985 n. 35 (S.D. Miss. 1964) (three-judge court) (Circuit Judge John R. Brown, dissenting) (emphasis added), *rev'd*, 380 U.S. 128 (1965).[23] Attorney General Katzenbach opened his testimony explaining the need for the Voting Rights Act with an account of how efforts to register African American voters in Selma, Alabama, had been obstructed by local officials. He explicitly identified the role of *elected state-court judges*, who had "*convicted*, and *punished* Negroes discriminatorily, and had *issued* and enforced *injunctions* preventing Negroes from organizing and discussing their grievances." *1965 Hearings* at 8

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[22]The opinion in *United States v. Mississippi* was discussed by Assistant Attorney General Marshall in his testimony before the Committee, *see 1965 House Hearings* at 306, and was introduced into the hearings record, *id.* at 484.

[23]This history is set out in a number of sources. *See generally, e.g.*, SOUTHERN JUSTICE (L. Friedman ed. 1963). *See also, e.g., Hamilton v. Alabama*, 376 U.S. 650 (1964) (reversing contempt citation issued by elected state trial judge and upheld by elected state supreme court because an African American litigant refused to be addressed by her first name when white witnesses were given courtesy titles); *Johnson v. Virginia*, 363 U.S. 61 (1963) (reversing conviction of African American spectator who refused to sit in segregated area of a courtroom).

(emphasis added).[24]

Against this backdrop of pervasive African American disenfranchisement and defiance of federal constitutional law by an elected state judiciary, Congress sought to empower African American citizens comprehensively by guaranteeing their full participation in every aspect of the electoral process. Thus, as the Fifth Circuit recognized, section 2, as originally enacted, clearly covered judicial elections. *LULAC v. Clements*, 914 F.2d at 625.[25]

B. *Congress' Understanding During the 1970 and 1975 Extensions*

In both 1970 and 1975, Congress extended the preclearance provisions of section 5 of the Voting Rights

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[24]The Department of Justice was at the time of the 1965 hearings involved in a lawsuit against, among others, Alabama state court Judge James Hare, who had been issuing what a federal court found to be "unwarranted and illegal injunctions" against demonstrators seeking the right to vote in Selma. *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (three-judge court); *see also* D. GARROW, PROTEST AT SELMA 33-34, 39-40 & 282 n. 55 (1978) (describing Hare's use of his judicial power to quash African American attempts to register).

[25]The slender reed upon which the Fifth Circuit ultimately relies in claiming a congressional intention to exempt judicial elections from section 2--the presence in the 1982 amendments of the word "representatives," *see LULAC v. Clements*, 914 F.2d at 624-30--is completely irrelevant to Congress' original intent, since the word appears nowhere in the statute.

Act. *See* Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975). On both occasions, Congress identified the increasing presence of elected minority jurists on state court benches as a sign of progress under the Act. *See, e.g.*, S. REP. No. 94-295, p. 14 (1975) (relying on figures from the U.S. Commission on Civil Rights that showed the number of African American "judges" and "justices of the peace" elected in counties with populations that were more than 25% African American); H.R. REP. No. 94-196, p. 7 (1975) (referring to documents describing the number of African American "Judges, Justices [and] Magistrates" elected in various jurisdictions); 115 Cong. Rec. 38,493 (Dec. 11, 1969) (comments of Rep. Ryan) (inclusion of table showing number of African American elected "Judges, District Court, . . . Magistrates, [and] Justices of the peace"). Thus, Congress clearly ackowledged again that one of the intended consequences of the Voting Rights Act was to enable minority citizens to participate equally in judicial elections and to elect minority judges to state courts.

C. *The 1982 Extension and Amendment of the Voting Rights Act*

In 1982, Congress revised the Voting Rights Act in several significant respects. First, it amended section 2 to "dispositively rejec[t] the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980)," requiring plaintiffs in a vote-dilution lawsuit to prove that the challenged practice was adopted or maintained for a discriminatory purpose. *Thornburg v. Gingles*, 478 U.S. at 43. Second, it extended the special preclearance requirement of section 5.

Significant attention was devoted to the progress minority voters had made in electing the candidates of their choice to a wide variety of public offices. And elected state-court judges were again explicitly included within the data relied on by Congress. *See, e.g.* H. REP. NO. 97-227, p. 7-9 (1982) (relying on a report by the Joint Center for Political Studies, Black Elected Officials: A National Roster, 1980, at 4-5, 14-15, which specifically identified judges); *1982 House Hearings* at 38, 193, 239, 280, 503,

574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (referring to elected state-court judges); *1982 Senate Hearings* at 208-09, 669, 748, 788, 789 (1982) (same). Not once did a single witness suggest that the election of judges should be treated any differently than the election of any other official. Not once did a single witness or Member of Congress suggest that judicial elections should be exempted from the Act generally, or from section 2 specifically.[26]

It was against this background of clear awareness of the Voting Rights Act's role in integrating the elected state judiciary and disapproval of the approach taken by this Court in *Bolden* that Congress amended section 2 of the Voting Rights Act. The most elementary consideration of Congress' purpose in amending section 2 utterly forecloses the argument that, despite the presence of explicit congressional intent in 1982 to broaden the scope of the Voting Rights Act, Congress implicitly exempted judicial

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[26]Indeed, the one explicit statement regarding the coverage of judicial elections under section 2 expressly stated that the amended section *would* "encompas[s] all governmental units, including . . . judicial districts . . . ." Senate Report at 151 (separate comments of Sen. Orrin Hatch).

elections from the scope of section 2.

First, section 2 was amended to eliminate any requirement that a plaintiff claiming racial vote dilution prove the dilutive *purpose* as well as the dilutive *result* of the challenged practice. Thus, section 2 of the Voting Rights Act provides *broader* protection than either section 1 of the Fourteenth Amendment or section 1 of the Fifteenth Amendment, because they each require proving purpose as well as result. Senate Report at 15, 39-40. The Fifteenth Amendment, of course, clearly prohibits states from electing their judges under a system that purposefully dilutes African American voting strength. *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). The *only* difference between the Fifteenth Amendment and amended section 2 is the presence of a purpose requirement. *See* Senate Report at 36-37 (whether or not a discriminatory purpose is shown is irrelevant to finding liability under section 2). Therefore, section 2 must prohibit states from electing their judges under a system that results in the dilution of black voting strength, whatever the purpose of

the system. Had Congress intended to create an exemption to the results test for judicial elections, it would have done so expressly.

Second, the inclusion of the word "representatives" in the delineation of the results test of amended section 2 provides absolutely no warrant for inferring an exemption of judicial elections from section 2's scope. That language was added to "embod[y] the test laid down by the Supreme Court in *White* [*v. Regester*, 403 U.S. 182 (1971)]," for determining when the use of multimember election districts dilutes minority voting strength. Senate Report at 27. It was not added to limit the preexisting scope of section 2, which undeniably covered judicial elections prior to 1982.[27] Moreover, in discussing the *White* results test, Congress used the word "representative" interchangeably with such words as "candidate" or "elected official." *See, e.g.*, Senate

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[27]The Fifth Circuit relied reflexively on language in the opinions of various district courts that had held that one-person, one-vote does not apply to judicial offices because judges are not "representatives" to lend color to its contention that Congress chose the word "representatives" precisely to exclude judges from the scope of section 2. *See LULAC*, 914 F.2d at 626 n. 9 (citing cases). Notably, not a single reference to any of the cases mentioned by the *LULAC* court appears anywhere in the legislative history of the 1982 amendments.

Report at 16, 28, 29, 30, 31, and 67; House Report at 4, 18. Thus, Congress never evinced any intention to give "representative" the exceptionally restrictive meaning advanced by the court of appeals in *LULAC*. To inject such an exemption into section 2 would violate the elementary canon of statutory construction that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (internal quotation marks omitted). The plain, obvious, and rational meaning of section 14(c)(1) has always been that *all* elections, including judicial elections, are covered by *all* of the Act's substantive commands.[28] And the plain, obvious, and rational meaning of the 1982 amendment of section 2 was simply to eliminate the purpose requirement announced in *Mobile v. Bolden* and to continue the coverage of elected state court judges that

[28]Nothing in the 1982 amendments altered section 14(c)(1), which defines the term "voting" for purposes of section 2 and section 5.

had existed since 1965.

III.
THE INAPPLICABILITY OF THE ONE-PERSON, ONE-VOTE REQUIREMENT OF THE EQUAL PROTECTION CLAUSE TO JUDICIAL ELECTIONS IS IRRELEVANT TO THE SCOPE OF SECTION 2

In *Wells v. Edwards*, 409 U.S. 1095 (1973), this Court summarily affirmed the holding of a district court that the requirement of one-person, one-vote does not govern elections to the Louisiana Supreme Court. 347 F. Supp. 453 (M.D. La. 1972) (three-judge court). The court of appeals seized on this holding to conclude that the statutory prohibition on racial vote dilution contained in section 2 should not apply to judicial elections either. *LULAC*, 914 F.2d at 626-28. That conclusion is simply wrong. First, this Court's resolution of *Wells* does not exempt judicial elections from constitutional and statutory scrutiny altogether. Second, the requirement of equipopulous districting and the purposes it serves are entirely distinct from the prohibition on racial vote dilution and its central objective.

A. *The Equal Protection Clause Does Govern Judicial Elections*

The equal protection clause of the Fourteenth Amendment is broader than the judicially created requirement of one-person, one-vote. Thus, even though one-person, one-vote does not govern judicial elections, the equal protection clause itself *does* apply to judicial elections. *See Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 730 (1973) (even though the appellants who challenged a scheme for electing members of a limited authority "derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claims assessed"). Thus, for example, it would undeniably violate the equal protection clause for Louisiana to allow only voters born in odd-numbered years to vote in elections to pick the Supreme Court. It would also violate the equal protection clause, as well as the Fifteenth Amendment, for Louisiana to deliberately establish or maintain a judicial election system

that makes it impossible for African American voters to cast effective ballots. If, for example, a Louisiana statute expressly provided that ballots would be identified according to the race of the persons who had cast them, and that a ballot cast by an African American voter would be counted as one-half of a vote for the candidate named, that, too, would violate the equal protection clause, despite the fact that one-person, one-vote does not apply to judicial elections.

Thus, the constitutional protection of the efficacy and weight of African American ballots in judicial elections clearly extends beyond the protection afforded by the requirement of equipopulous districting. And since Congress has the power under the enforcement clauses of the Fourteenth and Fifteenth Amendments to ban practices with discriminatory effects, as well as practices with discriminatory purposes, its use of that power in enacting the Voting Rights Act reaches even practices that would pass muster under the one-person, one-vote cases.

B. *The Theory of Vote Dilution Underlying One-Person, One-Vote Is Entirely Distinct from the Theory of Racial Vote Dilution Embodied in Section 2*

Reynolds v. Sims, 376 U.S. 533 (1964), struck down the apportionment scheme for the Alabama legislature because population disparities among the districts diluted the voting strength of voters living in the more heavily populated districts. But "population differences are not the only way in which a facially neutral districting plan might unconstitutionally undervalue the votes of some and overvalue the votes of others." Senate Report at 20. Even when one person's vote, in the abstract, is worth as much as any other person's, racial polarization and the submergence of a discrete and insular group of African Americans in a majority-white electoral jurisdiction may effectively deny the members of that group any opportunity to elect the candidates they prefer. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Burns v. Richardson*, 384 U.S.

73, 88-89 (1966).

Indeed, *White v. Regester*, and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), the two cases on which Congress relied in delineating the results test of amended section 2, Senate Report at 28 n. 113, *both* rest on precisely that distinction. In *White*, this Court reversed the district court's determination that the apportionment of the Texas House of Representatives violated one-person, one-vote, but sustained a finding that the use of multimember districts impermissibly diluted African American and Hispanic voting strength. *Compare* 412 U.S. at 761-64 (rejecting plaintiffs' one-person, one-vote claims) *with id.* at 765-70 (finding impermissible racial vote dilution). Even more pointedly, in *Zimmer* a one-person, one-vote challenge was not even theoretically available. East Carroll Parish selected its police jury through at-large elections, which as a matter of definition comply with one-person, one-vote: there can be no population deviation among districts when there are no

districts. *Zimmer*, 485 F.2d at 1301. The fact that plaintiffs could advance a claim of racial vote dilution despite the exemption of at-large elections from attack on one-person, one-vote grounds totally undercuts the assumption on which the *LULAC* analysis rests: that the inapplicability of one-person, one-vote to judicial elections necessarily shields them from scrutiny under section 2.

Another way of understanding this distinction is to realize that *Reynolds v. Sims* and its progeny protect an interest that is entirely distinct from the interest protected by the constitutional and statutory prohibitions on racial vote dilution. The standard required by *Reynolds* attempts to protect *majority* voting rights. Equipopulous districting combats the "frustration of the majority will" that results from malapportionment, 377 U.S. at 576, and prevents "a minority strangle hold on the State Legislature," *id.* at 570.[29]

[29]This Court's central concern with protecting the majority's voice in the legislative process explains why, in *Reynolds* and its companion cases, the Court so heavily emphasized the fact that the existing apportionment schemes allowed a numerical minority of the population to elect a majority of the states' legislators. *See, e.g., Reynolds*, 377 U.S. at 569; *WMCA v. Lomenzo*, 377 U.S. 633, 647 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 665-66 (1964); *Davis v. Mann*, 377 U.S. 678, 688-89 (1964); *Roman v. Sincock*, 377 U.S. 695, 705 (1964); *Lucas v. Colorado General assembly*, 377 U.S. 713, 725 (1964).

But the value underlying the prohibition on racial vote dilution is the protection of *minority* voters' participation. *See Gingles*, 478 U.S. at 49 and 50-51 (setting out the test for claims of racial vote dilution under section 2 with reference to "minority" voters' opportunities to participate); Senate Report at 28-29 (repeatedly using the word "minority" in describing the factors relevant to assessing a section 2 violation). And section 2 protects the voting rights of African Americans even when they "constitut[e] a distinct population and registered-voter minority in each challenged district." *Gingles*. 478 U.S. at 38.

The difference between the underpinnings of one-person, one-vote and section 2's ban on racially dilutive voting schemes totally undermines the court of appeals' reliance on the summary affirmance in *Wells*. Put simply, the inapplicability of constitutional requirements of equipopulous districting to judicial elections casts no light whatsoever on the scope of section 2.

IV.
THE POST-ELECTION DUTIES OF JUDGES DO NOT JUSTIFY CREATING AN EXCEPTION TO SECTION 2'S COVERAGE OF JUDICIAL ELECTIONS

The analytic heart of the court of appeals' opinion in *LULAC* is a normative vision of "the judge's office" as the "precise antithesis" of a "representative one." 914 F.2d at 628. Thus, the court below concluded, section 2 does not apply to judicial elections for "the cardinal reason that judges need not be elected at all." *Id.* at 622.

A fair reading of the majority's opinion will discern in it a deep uneasiness with the idea of an elected judiciary. But whether judges should or shouldn't be elected is quite simply beside the point. Louisiana *has* decided to elect its Supreme Court. The only question properly before this Court is whether a state that elects its judges can use an election system that denies African American voters the ability to participate fully in the selection process. As we explain below, the court of appeals' approach is trebly flawed. First, the court of appeals erred in holding that the

fact that the constitution does not require that states elect their judges relieves states of the obligation to use racially fair election systems. Second, the court of appeals improperly substituted its judgment regarding the proper level of popular control for the State of Louisiana's judgment. Third, the court of appeals ignored a clear, longstanding concern with ensuring representativeness within the state adjudicatory process.

A. *That Judges Need Not Be Elected At All Is Irrelevant to Whether Section 2 Covers Judicial Elections*

It is, of course, true that states have substantial latitude in deciding how to select their judiciary.[30] But if a State *does* choose to select its judges through popular elections, it must comply with section 2.

The fact that judges need not be elected in the first place is irrelevant to section 2's coverage. States are not

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[30]A decision by a state, such as Louisiana that is covered by section 5 of the Voting Rights Act to *change* from an elected to an appointive judiciary would require preclearance. *See Brooks*, 111 S.Ct. 288; *Haith*, 477 U.S. 901; *cf. Allen*, 393 U.S. 301 (change from elected to appointed superintendent of schools in certain Mississippi counties required preclearance).

required to hold elections to fill positions on local boards of education either, because such boards are of a "nonlegislative character." *Sailors v. Board of Education of Kent County*, 387 U.S. 105, 108, 111 (1967). But when local school boards *are* filled by election, section 2 clearly applies. *See, e.g., United States v. Dallas County Commission (and Dallas County Board of Education)*, 850 F.2d 1430 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); *League of United Latin American Citizens v. Midland Independent School District*, 829 F.2d 546 (5th Cir. 1987); *Buckanaga v. Sisseton Independent School District No. 545*, 804 F.2d 469 (8th Cir. 1986); *Brown v. Board of School Commissioners*, 706 F.2d 1103 (11th Cir.), *aff'd*, 464 U.S. 1005 (1983). *Cf. Allen v. State Board of Elections (Bunton v. Patterson)*, 393 U.S. 544 (1969) (section 5 covers change from elected to appointed school superintendent).

It is the fact of election, then, rather than the function performed by an elected official after his or her selection, that triggers section 2. Section 2 is intended to protect

minority *voters'* ability to participate in the election process, including their right to cast effective ballots. Nothing in section 2 limits its scope only to offices that must constitutionally be filled by election.

B. *Elected Judges Are In Fact "Representatives"*

The court of appeals asserted that because judges have no "constituents" and do not speak on behalf of "segments" of the community, they are not "representatives," and may therefore be elected in ways that deny to African Americans the ability whites enjoy to determine *which* persons should speak for the whole community. *LULAC*, 914 F.2d at 628.

In fact, judges *do* represent the community in that they "speak and act for [it] by delegated authority," RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1634 (2d ed. 1987) (defining "represent"). In a democracy, all power ultimately flows from popular consent. When a state's constitution or statutes gives judges the right to exercise adjudicative authority, judges are ultimately "representatives" of the people. The *way* in which judges

"represent" the community may differ significantly from the way in which legislators "represent" it, because judges are not expected to base their determinations on the voters' views about proper outcomes. But they are "representatives" nonetheless. They "represent" (in the sense of "reflecting") the choice of the voters as to who should exercise, on behalf of the community as a whole and using his or her independent judgment, adjudicative power.

Implicit in the court of appeals' analysis is the belief that judges should not be elected at all, because election inevitably compromises judicial independence from popular passions and sentiments. It would hardly be surprising if federal judges were to prefer an appointed judiciary, enjoying life tenure, to an elected judiciary, dependent for its continuation in office on popular approval. But the court of appeals erred critically in elevating the elected state judiciary to the status of "a mystical entity" and in potraying state judges "as annointed priests set apart from the community." *Landmark Communications v. Virginia*, 435 U.S. 829, 842 (1978) (quoting *Bridges v. California*, 314

U.S. 252, 291 (1941) (Frankfurter, J., dissenting). *See also Craig v. Harney*, 331 U.S. 367, 377 (1947) ("Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected.").

The desire to give voters the ability to select the judiciary directly, through the political process, was the motivating factor behind the switch from appointive to elected state judiciaries during the heyday of Jacksonian democracy. *See generally, e.g.*, E. HAYNES, THE SELECTION AND TENURE OF JUDGES (1944); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 126-27 (2d ed. 1985); Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920, in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984). If Louisiana chooses to give voters the power to determine who sits on the state's bench, the only responsibility the federal courts have is the responsibility to ensure that its method of election complies with the federal Constitution and the Voting Rights Act.

C. *"Representativeness" Occupies a Critical Constitutional Position Within the Judicial System*

The court of appeals treated the use of the word "representatives" in section 2 as if it reflected a congressional intent to restrict section 2's coverage solely to legislative offices. Congress had quite a contrary intent: the language it chose in 1965 to define the term "vote" expressly covered the election of *every* "public office," and since that time it has repeatedly expanded, and never contracted, the Act's scope. *See supra* Parts I and II. Moreover, as the undisputed coverage of elections for such nonlegislative bodies as school boards also shows, Congress never restricted section 2 to legislative offices.

The court of appeals' cramped equation of the term "representatives" with "legislators" completely ignored two central lines of constitutional cases construing that term *in the context of state judicial systems*. For over a century, this Court's equal protection jurisprudence has sought to include African Americans within the adjudicative process

as jurors, and has explained the importance of their inclusion in terms of "representativeness." Similarly, this Court's jurisprudence under the fair cross section requirement of the Sixth Amendment has relied heavily on a conception of jurors as "representatives" of the community to explain why no distinctive group can be excluded from the venire.

In *Smith v. Texas*, 311 U.S. 128 (1940), this Court stated that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly *representative* of the community." *Id.* at 130 (emphasis added). The exclusion of African Americans from participation on juries is "at war with our basic concepts of democratic society and a *representative* government." *Id.* (emphasis added).

This Court's jury exclusion cases offer an especially salient perspective on the question of the "representativeness" of the state bench. For the past 111 years, the equal protection clause has prohibited systematic exclusion of African Americans from jury venires and petit

juries, and has required that jury venires be "representative" of the community from which they are drawn, *not* because it expects black jurors to favor black litigants, but because the system's legitimacy depends on racial inclusiveness. African Americans who are excluded from juries are denied "the equal participation in civic life that the Fourteenth Amendment guarantees." *Holland v. Illinois*, 110 S.Ct. 803, 812 (1990) (Kennedy, J., concurring). *See also, e.g., Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. . . . [and to] undermine public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87; *see also Vasquez v. Hillery*, 474 U.S. 254, 261 (1986) (deliberate exclusion of African Americans from jury service is "a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others") (quoting *Strauder*, 100

U.S. at 308).[31]

This Court's applications of the fair cross section requirement of the Sixth Amendment to jury venires reflects a similar concern with ensuring the "representativeness" in the administration of justice. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court struck down Louisiana's automatic exemption of women from jury service on the ground that it denied defendants, male and female alike, a representative venire. *See also Peters v. Kiff*, 407 U.S. 493 (1972) (holding that white defendants could challenge the systematic exclusion of African Americans from the venire). The *Taylor* Court noted that "sharing in the administration of justice is a phase of civic responsibility." 419 U.S. at 531 (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). And it noted the critical, if indeterminate, importance of such participation by distinct groups: "qualities of human nature and varieties of

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[31]The exclusion of a distinctive racial group from the adjudicative process may have additional ramifications when the "shared enterprise of appellate decisionmaking," *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring in the judgment), is involved, as it is in this case.

human experience, the range of which is unknown and perhaps unknowable" are lost by the systematic exclusion of a distinct group from the adjudicative process. *Id.* at 532 n. 12 (quoting *Peters v. Kiff*, 407 U.S. at 504 (opinion of Marshall, J.)).

The values that underlie racial inclusiveness in the jury context are equally important to judicial elections. The use of the word "representatives" in section 2 is entirely consistent with the inclusion of judicial elections.

First, the fact that judges, like jurors, are required to be impartial does not remove them from their critical position in the scheme of representative government. African American jurors, like all other jurors, represent the conscience of the community, but are not expected to be partisans for a distinct African American point of view. African American judges, and judges whose electoral success depended on the votes of African American voters, are similarly expected to be simultaneously representative (in the distinctive way in which judges represent the people) and impartial.

Second, to deny African American citizens the ability to participate in the process of meting out justice by denying them the ability to cast effective ballots in judicial elections is no more acceptable than denying them the ability to participate in that process by serving as jurors. *See, e.g., Carter v. Jury Commission*, 396 U.S. at 330 ("Whether jury service be deemed a right, a privilege, or a duty, the state may no more extend it to some of its citizens and deny it to others on racial grounds, than it may invidiously discriminate in the offering and witholding of the elective franchise.").

Third, the legitimacy of the state judiciary is undermined when only white citizens have an realistic role in picking judges or in serving on the bench.[32] Of course, section 2, like this Court's jury representativeness cases,

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[32]Although the jury exclusion cases that rest on the equal protection clause of the Fourteenth Amendment require a showing of discriminatory purpose, the cases that rely on the fair cross section requirement do not require a showing of discriminatory purpose. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 368 n. 26 (1978). In any event, of course, Congress has made clear that a showing of discriminatory purpose is wholly unnecessary to a claim under the Voting Rights Act. *See, e.g.*, Senate Report at 36. Thus, whether the exclusion of African Americans and African American-sponsored choices from judicial positions is intentional or inadvertent is irrelevant to its illegitimacy.

makes clear that minorities have no entitlement to proportional representation. But they must have the "same opportunity" enjoyed by white citizens to select the officials who administer justice.

V.

MANAGEABLE STANDARDS EXIST FOR ASSESSING CLAIMS OF RACIAL VOTE DILUTION IN JUDICIAL ELECTIONS

The court of appeals suggested that, because judicial elections are not governed by one-person, one-vote, there is essentially no way of assessing a claim of racial vote dilution. *LULAC*, 914 F.2d at 627. To the contrary, judicial election systems can be analyzed under the well-established, totality-of-the-circumstances test that governs other statutory claims of racial vote dilution.

The factors relevant to a section 2 claim involving judicial elections are similar to the factors relevant to assessing a section 2 claim in any other case. The facts described in the Statement of Facts dovetail with those that would support a challenge to at-large elections or

multimember districts for a school board, or county commission, or state legislature. That is hardly surprising: the way in which judges are elected in Louisiana is identical in every formal respect to the way that most other state officials are elected. Thus, petitioners showed how "social and historical conditions," including pervasive and profound racial bloc voting interacted with the multimember form of the First Supreme Court District to "cause an inequality" in their opportunity to elect the candidates of their choice. *Gingles*, 478 U.S. at 47. If, as this Court has held, "the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized," are the linchpins of a claim of dilution through submergence, *id.* at 48 n. 15, then petitioners surely alleged sufficient facts to make out a section 2 violation.

Moreover, this case shows how, even in the absence of a requirement of equipopulous districting, section 2 plaintiffs can satisfy the first prong of *Gingles*: that the minority group "is sufficiently large and geographically compact to

constitute a majority in a single-member district." *Id.* at 50. When one-person, one-vote applies, lower courts have required plaintiffs to present hypothetical districts whose deviations comply with that standard. *See, e.g., Romero v. City of Pomona*, 665 F. Supp. 853, 864 (C. D. Cal. 1987) (holding that plaintiffs' inability to provide alternatives to existing at-large system that complied with one-person, one-vote defeated their section 2 claim), *aff'd*, 883 F.2d 1418 (9th Cir. 1989).

In a situation where one-person, one-vote does not apply and a state has chosen to use districts with population deviations larger than would otherwise be permitted, the appropriate standard for determining whether plaintiffs have satisfied the first *Gingles* precondition would appear to be whether the deviations of the plaintiffs' hypothetical districts fall within the level of deviation already countenanced under the existing plan. Thus, in this case, for example, the existing single-member Supreme Court Districts in Louisiana have deviations of +43.33%, +15.33%, -3.10%, -7.40%, and -31.62%. Pet. App. 12a. Petitioners' proposed

division of the existing First Supreme Court District would create two districts--one with a -7.2% deviation and the other with a -9.3% deviation. Pet. App. 13a-14a. Since this deviation fits well within the level of deviation Louisiana has already deemed acceptable, it should suffice to establish the first requirement set out in *Gingles*.

Nor should remedial concerns limit section 2's coverage. As is set out more fully in the Brief for Petitioners in *Houston Lawyers' Ass'n v. Mattox*, No. 90-813, the propriety of single-member districts as a remedy for dilution in particular judicial election schemes is irrelevant to the question whether section 2 covers judicial elections. In any event, surely plaintiffs like the petitioners in this case should be able to challenge the use of multimember judicial districts in areas of high African American population concentrations when single-member districts are used everywhere else in the state.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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